WHEN TALK ISN'T CHEAP: THE HIDDEN COSTS OF COMMUNICATION WITH PUTATIVE CLASS MEMBERS FOR CLASS ACTION DEFENSE COUNSEL IN A POST-FINANCIAL RECESSION WORLD

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> "Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough." - Abraham Lincoln.

I. INTRODUCTION

Desperate times call for desperate measures. Out of the 210 federal securities class actions filed in 2008, 103 of the defendants were financial companies and 91 of the filings stemmed from the subprime/liquidity crisis.[1] The onset of a crisis is often the catalyst to changes within the government and business community. "The recent surge in new securities litigation is event-driven, the result of the subprime crisis."[2] The movement towards fairness is always the goal of the law, but for defense counsel searching for a way to reduce litigation costs and increase a favorable judgment for their client- these efforts have not gone far enough to decrease the one-sided costs incurred during the pre-certification stage of class action litigation. At the pre-certification stage, defense counsel faces infringements upon their fundamental right to free speech under the First Amendment and expansive restrictions on speech set by district. One of the attempts to reign in the costs of class action litigation was the Class Action Fairness Act of 2005, which helped move more class action cases from state to federal courts.[3] This article will discuss the efforts of the courts and the federal government through the Class Action Fairness Act and state courts erroneously applying the *Gulf Oil v. Bernard* standard set by the Supreme Court.

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[1] STANDFORD LAW SCHOOL, CLASS ACTION SECURITIES LITIGATION 2008: A YEAR IN REVIEW, http://securities.stanford.edu/clearinghouse_research.html (last visited Jan. 10, 2010).

[2] *Id.*

[3] CLASS ACTION FAIRNESS ACT OF 2005, S. REP. NO. 109-14 (2005).

Defense counsel wishing to reach a settlement or defeat class certification will often encounter the question of whether it is economically and legally beneficial to communicate with class members before certification. The costs of communication incurred by defense counsel are unique to their position in class action litigation because absent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, or liability for fees or costs. Absent class members have "no real duties to the parties or the court."[4] They are also not subject to coercive or punitive remedies.[5] Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiff's claims litigated at trial.[6] Defendants also face the added burden of combating powerful plaintiff attorneys and face "judicial blackmail" when they are sued in jurisdictions that are considered plaintiff- friendly.[7] Such leverage can essentially force corporate defendants to pay ransom to a class attorney by settling—rather than litigating—frivolous lawsuits.[8] Lawsuits with little to no merit are easily brought to fruition because they can be prosecuted inexpensively.[9] Defendants may want to communicate to conduct an aggressive discovery effort even if the result will only provide a "modest chance of defeating certification."[10] In that process, defense counsel may find information that will disarm the entire class or even the class representative.[11] Interests that must be balanced include the interest of the class members to be protected from harmful information and the positions of the parties involved in the litigation.[12]

The first section of this analysis will discuss the current legal framework for how defense counsel should approach pre-certification communication. The second section will discuss the current legal scholarship on communication with putative class members and the economic costs and benefits of pursuing communication with putative class members.

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[4] Craig M. Freeman, *Knowledge is Power: A Practical Proposal to Protect Putative Class Members from Improper Pre-Certification Communication,* 2006 FED. CTS. L. REV. 2, 4 (2006) (discussion of the need to improve judicial oversight of communication with putative class members).

[5] *Id.*

[6] Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 810 (1985).

[7] *Id.*

[8] S. REP. NO. 109-014, at 20 (2005).

[9] Douglas R. Richmond, *Class Actions and Ex Parte Communications: Can We Talk?*, 68 MO. L. REV. 810, 814 (2003).

[10] Susan Getzendanner, *Class Certification Discovery,* 15 LITIG. 25, 25 (1989).

[11] *Id.*

[12] Equal Employment Opportunity Comm'n v. Morgan Stanley & Co., 206 F. Supp. 2d 559, 562 (S.D.N.Y. 2002).

II. TO COMMUNICATE OR NOT TO COMMUNICATE? THAT IS THE QUESTION

The law governing the right to communicate with putative class action members begins at the free speech clause of the Constitution.[13] Its foundation is also composed of statutory regulation by the Federal Rules of Civil Procedure and case law, with the corner stone of judicial interpretation the Supreme Court's decision in *Gulf Oil Co.*[14] The First Amendment states "Congress shall make no law respecting an establishment of religion, or abridging the freedom of speech, or of the press."[15] The guarantee of freedom of expression is not without limits, but it is a fundamental right every United States citizen and private organization may exercise. Limitations on the exercise of free speech are lawful and in the case of lawyers, commercial speech aimed at contacting and soliciting clients is lawfully limited by the court system.[16] This is in compliance with the Supreme Court's view that "although commercial speech is protected by the First Amendment, not all regulation of such speech is unconstitutional."[17] Laws created that unduly burden this right are vehemently opposed by the Supreme Court— in the context of class action litigation, any court restrictions on communication between plaintiff

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[13] Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981).

[14] *Id.* Putative or absent class member – both terms will be used interchangeably throughout this note. Putative as defined by Black's Law Dictionary, meaning "reputed, believed supposed." BLACK'S LAW DICTIONARY 1272 (8th ed. 1999).

[15] U.S. CONST. amend. I.

[16] *See generally* Chaplinksy v. New Hampshire, 315 U.S. 568, 572-73 (1942) ("It is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem.").

[17] Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002). The test for commercial speech is whether it concerns:

> [U]nlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however, we next ask whether the asserted governmental interest is substantial. If it is, then we determine whether the regulation directly advances the governmental interest asserted, and, finally, whether it is not more extensive than is necessary to serve that interest. Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional.

Id.

counsel, defense counsel and potential class members must comply with the freedom of speech.

Federal Rule of Civil Procedure 23 governs class action lawsuits, allowing one or more members of a class to sue or be sued as representatives if the class meets the Rule's requirements.[18] Classes seeking certification must 1) numerous, 2) with questions of law or fact common to the class, 3) claims or defenses are typical of the claims or defenses of the class and 4) the representative parties will fairly and adequately protect the interests of the class.[19] Once the class meets the requirements set by 23(a), it must also go through certification orders set by the judge governing the class action.[20] Judges may have to "probe behind the pleadings before coming to rest on the certification question."[21] Judges are still free to determine whether or not during the course of litigation, the class certification needs to be changed or modified.[22] Class action litigants must keep in mind that the right to commence a class action proceeding is "a procedural right only, ancillary to the litigation of substantive claims. Should these substantive claims become moot in the Article III sense, by settlement of all personal claims for example, the court retains no jurisdiction over the controversy of the individual plaintiffs."[23] Absent class members are "not required to do anything. [They] may sit back and allow litigation to run its course, content in knowing that there are safeguards provided for [their] protection."[24] Even if an unfavorable judgment is rendered against the class in a class action, putative class members do not have to succumb to coercive remedies.[25]

Fed. Civ. Pro. Rule 23(d) allows the court to control communication between plaintiffs and defendants' counsel and potential class members in class action litigation.[26] Rule 23 authorizes courts to "regulate communications with potential class members, even before certification."[27] The right of the court to control communications between the respective parties' counsel and potential class members is limited by the First Amendment and a clear record of possible need to limit speech and potential interference with the rights of each party.[28] The standard set by the Supreme Court in *Gulf Oil Co.* allows the district court to determine

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[18] FED. R. CIV. P. 23(a).
[19] *Id.*
[20] *Id.*
[21] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982).
[22] *Id.*
[23] Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980).
[24] Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 810 (1985).
[25] *Id.*
[26] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.12 (2004).
[27] *Id.*
[28] *Id.*

whether communication engaged in by counsel for both parties is appropriate on an individual case basis. [29] When a relationship is inherently coercive, there still must be a clear showing of abuse but the court may decline to find a specific instance of abuse.[30]

Although the court has the ultimate power to control communication between parties, it is an ambiguous power. Communication boundaries between parties and unnamed class members are undefined because of the court's power to restrain and expand communication on a case-by-case basis.[31] One of the legal costs consists of whether defense counsel will be subject to court sanctions if communication with putative class members falls within discovery- if so, the defendant must provide a strong reason as to why absent class members should be compelled to respond to discovery.[32]

Besides the power to limit communication given by the Federal Rules of Civil Procedure and *Gulf Oil Co.*, the court can on its own act to restrict communications between the defendants and class members. [33] The purpose of court ordered communication restrictions must relate to insuring the best interests of class members are protected.[34] "The Court must balance the interest of the parties in presenting their respective positions and the interest of class members in being free from inappropriate influences."[35] Courts especially feel the need to closely monitor class actions between employees and defendant employers because "the danger of such coercion between employers and employees [is] sufficient to warrant the imposition of restrictions regarding communication between defendants and potential class members."[36] Restrictions also reach to the core of Federal Rule of

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[29] Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 (1981).

[30] Ralph Oldsmobile, Inc., v. Gen. Motors Corp., 99 Civ. 4567(AGS), 2001 WL 1035132, at *3 (S.D.N.Y. Sept. 7, 2001). The court reversed the district court's orders to restrict communication. In its decision, the court found that it was not easy to interfere between the business relationships of the defendant and putative class members. Courts cannot simply interpose themselves in the business relationship between a franchisor and its franchisees each time a franchisee files a putative class action against the franchisor. Notifying the dealers in this action, and their ability to communicate with counsel and participate in the action, should, however, provide a reasonable measure of protection. *Id.* at *6.

[31] *See generally Gulf Oil Co.*, 452 U.S. at 89.

[32] Enter. Wall Paper Mfg. Co. v. Bodman, 85 F.R.D. 325, 327 (S.D.N.Y. 1980).

[33] Cobell v. Norton, 225 F.R.D. 4, 7 (D.D.C. 2004).

[34] *Id.*

[35] Equal Employment Opportunity Comm'n v. Morgan Stanley & Co., 206 F. Supp. 2d 559, 562 (S.D.N.Y. 2002).

[36] *Id.*

Civil Procedure 23(b)(3)(D), requiring that certified classes also meet the manageability requirement- "addressing the whole range of practical problems that may render the class action format inappropriate for a particular suit."[37] With reference to this litigation, the Court of Appeals noted that the difficulties of distributing any ultimate recovery to the class members would be formidable, though not necessarily insuperable, and commented that it was "reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them."[38] The 23(d) provision of the Federal Rules of Civil Procedure also states that the court can impose "conditions on the representative parties or on interveners."[39]

A. *Supreme Court's* Gulf Oil *Communication Rule*

The Supreme Court in *Gulf Oil* ruled that communication between putative class members and counsel cannot be restricted unless the district court has a reason to do so.[40] In *Gulf Oil Co. v. Bernard,* the Supreme Court answered the question of whether it is constitutionally permissible to limit communication between possible class action members and parties.[41] The Supreme Court held that "because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties."[42] In *Gulf Oil Co.*, the plaintiff filed suit against the defendant alleging racial discrimination in the workplace.[43] The defendant sent potential class members settlement offers in exchange for a release form waiving any claims they may have for racial discrimination against the company.[44] The defendant filed a motion to restrict communications between the putative class members and counsel for both parties.[45] The court dismissed the defendant's motion because "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties."[46] The Supreme Court in *Gulf Oil Co. v. Bernard,* instructs the district court to provide a clear record, which would "ensure that the court is furthering, rather than hindering, the policies embodied in the Federal

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[37] *Id.*
[38] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974).
[39] FED. R. CIV. P. 23(d).
[40] Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 (1981).
[41] *Id.*
[42] *Id.* at 100.
[43] *Id.* at 92.
[44] *Id.* at 91.
[45] *Id.* at 92.
[46] *Id.* at 101.

Rules of Civil Procedure, especially 23."[47] The Supreme Court also noted that there are serious issues revolving around restraints on expression involved in judicial orders restraining communication.[48] In addition, "such a weighing – identifying the potential abuses being addressed – should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances."[49] The Court declined to analyze the First Amendment issues in restrictions of communication- only in cases where there is a "fully developed case load" will the court decide to deal with the issue.[50]

Gulf Oil Co. stands for the proposition that action by the court should only commence upon a finding that the defendant has *actually engaged* in harmful communication with putative class members, not in the fear that such communication will occur.[51] The court "may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened. Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23."[52] If the district court finds sufficient evidence to impose a communication restriction upon a party, they must be certain that "the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties."[53] By weighing different factors and the evidence provided by the party requesting the communication restriction, the district court will provide a record for appellate review in case the restricted party requests an appeal.[54] The district court's failure to review evidence before restricting communication by the parties is an abuse of discretion. [55]

It has almost been twenty years since the Court handed down its decision in *Gulf Oil Co.*, and federal courts have all interpreted its decision with different results on a circuit-by-circuit basis. The Supreme Court has provided little guidance since its decision. It may be due to the fact that because of their proximity to the litigation, trial judges have gained the wisdom necessary to know when to begin involvement in the

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[47] *Id.* at 101-02.
[48] *Id.* at 104.
[49] *Id.*
[50] *Id.* at 101 n.12.
[51] *Id.*
[52] *Id.* at 102.
[53] *Id.*
[54] *Id.* at 103.
[55] *Id.*

communication of parties involved in class action before class certification.[56] The Supreme Court in *Hoffman-La Roche Inc. v. Sperling* observed that the almost boundless authority of the trial court to man its own affairs is "well settled, as courts traditionally have exercised considerable authority 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"[57] The only semblance of restraint provided by the Supreme Court is a reminder that courts must not compromise their commitment to judicial neutrality in its decision to control the communication process and avoid any semblance of judicial endorsement of any action taken by any party during litigation.[58]

Erosion of the *Gulf Oil Co.* standard allows movants who wish to limit defense counsel communication to merely show that there could be some harmful communication rather than meet the burden of proof showing that harmful communication has occurred.[59] This can be used as a litigation tool for plaintiffs to obtain information about the defense counsel's plans to resolve litigation, whether it is through settlement or trial.[60] Part of the litigation process is to allow both sides to present their best case, and unjustifiable increases of court control over party communication will deter defense counsel from taking communication strategies that may be in the best interest of their client in fear of court communication restrictions or in a worst case scenario, court sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.[61] The outlook worsens for defense counsel when a district court who does not have jurisdiction over a case, exercises jurisdiction, and when jurisdiction is challenged, it leaves defendants open to more lawsuits in different states and countries with different decisions attached to them.[62] This is in direct contradiction to the rule requiring a "judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party."[63]

B. *Courts Have Their Own Approach to Pre-Certification Communication*

The vague standard set by the Supreme Court in *Gulf Oil Co.* has allowed each circuit court to determine whether or not defense counsel has engaged in improper communication with class members on an individual

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[56] Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 171 (1989).
[57] *Id.* at 172-73 (internal citations omitted).
[58] *Id.* at 174.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 800 (1985).
[63] *Id.* at 805.

case basis. State courts have found that "for the purposes of defense communication with 216(b) prospective plaintiffs [state of Florida case law] the situation is analogous to a pre-certification Rule 23 class action, when the prospective plaintiffs are still unrepresented parties."[64] Appellate courts have reversed court-ordered communication restrictions where a lack of evidence shows possible abuse by the restricted party. If defense counsel appeals the decision of the district court on whether the pre-certification communication was proper, they should tailor their argument to each circuit court. The Eighth Circuit has adopted the *Gulf Oil Co.* rule controlling communication with putative class members.[65] In *Great Rivers Cooperative v. Farmland Industries, Inc.,* the district court granted plaintiffs' request to restrict defendant's communications with putative class members.[66] Plaintiffs filed suit against Great Rivers Cooperative alleging the cooperative had violated RICO, federal securities laws, and state laws when they failed to redeem equity.[67] The cooperative published a two-page opinion letter and sent it to members of the cooperative, denouncing all of the charges.[68] The district court granted the plaintiff's motion to restrict communication between the defendant and cooperative members because the publication contained misleading information.[69] The Eighth Circuit overturned the district court's decision because "the district court made insufficient findings regarding misrepresentation and the likelihood of serious abuses.[70] That a statement "appears'" in certain respects to be "somewhat misleading" is not sufficient to require a party to print a rebuttal without serious and careful weighing of that party's First Amendment rights."[71] There must be "a clear record of and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties."[72] "The effect of a defendant attempting to influence potential plaintiffs not to join a potential class action is just as damaging to the purposes of Rule 23 as a defendant that influences members of an already certified class to opt out.... In both scenarios,

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[64] 2-22 MEALEY'S LITIG. REP. CLASS ACTIONS 26 (2003).
[65] *See generally* Great Rivers Coop. v. Farmland Indus. Inc., 59 F.3d 764 (8th Cir. 1995).
[66] *Id.* at 1.
[67] *Id.*
[68] *Id.* at 2.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 3.

improper communication could diminish the size of the class or potential class, and thus, reduce the potential liability."[73]

A case where the court declined to find any misconduct by the defendant's communication to the putative class members involved distribution of a settlement agreement by the defendant's agents. In *Bradford v. Union Pacific Railroad Co.,* Union Pacific sent putative class members a form letter about their claims, asking the claimant to confirm that he initiated contact with Union Pacific about their claim, if he was represented by an attorney, and informed plaintiff that he had a right to an attorney.[74] "Union Pacific took the initiative to inform the Court of unrepresented claimants contacting it about settling their claims and to seek the Court's guidance. Since that time, Union Pacific has taken steps to ensure that claimants who contact it know that this class action is pending and that they may consult with an attorney about their claim."[75] *Bradford* can be differentiated from the *Great Rivers Cooperative* decision because the evidence of harmful communication was not present in the *Bradford* case. The unnamed class members in *Bradford* were only a small number of claimants (eight) and also the communication clearly informed the unnamed class members that they were entitled to a lawyer.[76] Once the class action case was filed, the company shut down the claims office and took the initiative to inform claimants of their legal rights as unnamed class members.[77]

Defendants in *Bublitz v. E.I DuPont de Nemours Co.* wanted to provide a retention proposal directly to members of the putative class as well as other related communications.[78] Defendants filed a motion to allow the communications, but maintained that the motion was not necessary.[79] The judge granted the defendant's motion, and the plaintiff moved to set aside the Magistrate decision.[80] The Eighth Circuit held that there was "insufficient evidence to justify the limitations on the Defendant's communications."[81] The court found the defendant's relationship with the putative class members as employer-employee to be a significant aspect of whether or not the at-will employer-employee relationship could allow the

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[73] Keystone Tobacco Co., Inc. v. U.S. Tobacco Co., 238 F. Supp. 2d 151, 154-55 (D.D.C. 2002).
[74] Bradford v. Union Pac. R.R. Co., 05CV4075, 2006 U.S. Dist. LEXIS 37910, at *3-4 (W.D. Ark. 2006).
[75] *Id.* at *4.
[76] *Id.*
[77] *Id.*
[78] Bublitz v. E.I. DuPont de Nemours Co., 196 F.R.D. 545, 546 (S.D. Iowa 2000).
[79] *Id.*
[80] *Id.*
[81] *Id.* at 547.

defendant undue influence and coercion.[82] This court incorrectly concluded that the mere possibility of coercion by the defendant justified "minimal" protection of putative class members by the court.[83] The "defendant-employer has the right to communicate settlement offers directly to putative class-member employees."[84] The defendant was required to provide a copy of the communication in writing to class members along with the names of the persons it was sent to, to the Court and to Plaintiff's counsel and give the putative class member ten days to respond.[85] The decision in *Bublitz* primarily hinged upon the defendant providing *inaccurate* information to putative class members, which changed the course of the class-action litigation. The course of action the Eighth Circuit will take to respond to restrict specific communications between unnamed class members and defense counsel is unclear. It is unclear because the answer is dependent upon the nature of the communication proposed by the defendant.

From the decisions cited above, one can surmise that the court's primary concern is to protect unnamed class members for misleading information that may change the course of the pre-certification hearing. Defense counsel should refrain from distributing information that the court may find misleading.[86] If defense counsel acts cautiously to be sure the information distributed is not misleading or patently false, then it is highly likely that the court will not restrict communication, and the defense counsel will not violate professional rules of conduct governing communication between attorneys and unrepresented individuals. Courts have held defendants liable for distributing false information to class members by court precedent, such as the *Bublitz* case, and also under the state's Professional Rules of Conduct. Violations of the Professional Rules of Conduct are an important concern for defense counsel to take into account because of the unclear nature of whether or not unnamed class members are truly unrepresented by counsel.[87]

In *Kleiner v. First National Bank*, the decision to limit communication did not require "particularized findings of abusive conduct when a given form of speech is inherently conducive to overreaching and duress."[88] The Fifth Circuit has interpreted Fed. R. Civ. P. 23(d) to vest

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[82] *Id.*
[83] *Id.*
[84] *Id.* at 548.
[85] *Id.* at 549.
[86] *Id.*
[87] *Id.*
[88] Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1206 (11th Cir. 1985). The court, in its restriction of communication between defendants and putative

power in the district court to "enlist the aid of a defendant in identifying class members to whom notice must be sent." [89] Not only are defendants saddled with the task of preparing for litigation in the Fifth Circuit, they are also required to spend limited funds and time assisting the plaintiff in identifying absent class members.[90] This is in contradiction to the Supreme Court's rule that in the case of class action litigation, "the representative plaintiff should perform the tasks, for it is he who seeks to maintain the suit as a class action and to represent other members of his class." In *Eisen IV* we noted the general principle that a party must bear the 'burden of financing his own suit'.[91] Compiling records and submitting them if they are relevant to the plaintiff's case is certainly within the rights given by Fed. R. Civ. P. 26, which allows parties to obtain information of the "name and number of each individual likely to have discoverable information."[92] The Supreme Court in *Oppenheimer* found that the order for the defendants to compile these records constituted a breach of discretion.[93] There was a breach of discretion because "courts must not stray too far from the principle underlying *Eisen IV* that the representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action."[94] The Court feared that allowing the district court to shift costs for the sake of their own convenience in spite of court precedent requiring plaintiffs to find their own class members would allow courts to make decisions based on their own convenience at the injustice of the defendant.[95] Deciding otherwise would "discourage [defense counsel] from advancing arguments entirely appropriate to the protection of his rights or the rights of absent class members."[96] Absent members are not under such constraint, especially in light of the fact that the law is unsettled as to "whether an absent class member may appeal the denial of a class action when the named plaintiff has been denied appeal because his or her claim is sufficient to warrant individual prosecution has not been definitely answered."[97]

District courts, following the decision in *Kleiner,* have developed a

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class members found that the intent of the defendant was an important consideration, especially in light of the fact that the communication practices complained of "was to solicit as many exclusions as possible before the court was alerted to the operation." It was not for the purpose of "alleviating customer confusion" as claimed by the defendants. *Id.* at 1201.

[89] Oppenheimer Fund v. Sanders, 437 U.S. 340, 348 (1978).

[90] *Id.*

[91] *Id.* at 356.

[92] FED. R. CIV. P. 26.

[93] *Oppenheimer*, 437 U.S. at 356.

[94] *Id.* at 359.

[95] *Id.* at 360.

[96] *Id.*

[97] 3 NEWBERG ON CLASS ACTIONS § 7.45 (4th ed. 2009).

four-part test to determine whether the defense counsel communication with putative class members is improper. "In determining the existence of good cause, four criteria must be considered: 1) the severity and likelihood of perceived harm; 2) the precision with which the order is draw; 3) the availability of a less onerous alternative; and 4) the duration of the order."[98] Statements issued by the defense counsel urging opt-out of the class "by their very nature, are likely to produce distorted statements on the one hand and the coercion of individuals on the other."[99] Both the decisions in *Kleiner* and *Wang* had the common thread that the communication involved extreme acts of reckless conduct on the part of the defendants.[100] In *In Re Currency Conversion Fee Antitrust Litigation,* the district court determined that *any* communication with putative class members for the purpose of changing the course of a pending court action is improper unless there is expressed authorization given by the court.[101] The controversy at hand in this case was a claim by plaintiff's counsel that the currency interest charges in a credit card agreement were excessive and charged regardless of whether a cardholder has or has not exchanged any foreign currency- in violation of the Truth in Lending Act, Sherman Act, and South Dakota Deceptive Trade Practices Act.[102] The rationale behind their decision is that they interpreted *Gulf Oil Co.* to only apply to *plaintiff's* counsel communication with putative class members. Adhering to a strict interpretation of the *Gulf Oil Co.* decision, the district court in *In Re Currency Conversion Fee Antitrust Litigation* unduly infringed upon the defendant's first amendment right to communicate with putative class members.[103] To further justify the restriction, the court states that even if the defendant were to argue that his First Amendment rights were unjustly compromised by the court restriction, the speech at hand was commercial speech, therefore it is given less protection under the First Amendment

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[98] Wang v. Chinese Daily News, Inc., 236 F.R.D. 485, 490 (C.D. Cal. 2006).
[99] *Id.*
[100] *See generally Wang*, 236 F.R.D. at 485; *Kleiner*, 751 F.2d at 1193. Defendants in the *Wang* case posted a notice in the work room near opt-out notices urging that the employees "Don't Tear the Company Apart! Don't Act Against Each Other!" Managers also held meetings notifying employees that any action against the company would "cost the employees money and kill the newspaper." In *Kleiner*, the defendant assigned employees to a calling list to contact bank customers and persuade them to opt out of the class. Employees were "handed computer lists of customers marked 'friend' or 'foe' as well as score sheets lined with columns for tallying opt-out commitments and the dollar amounts of the corresponding loans.
[101] *In re* Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237, 253 (S.D.N.Y. 2005).
[102] *Id.*
[103] *Id.* at 253.

under the court's jurisprudence on freedom of commercial speech cases.[104] *In Re Currency Conversion Fee Antitrust Litigation* is a prime example of how the *Gulf Oil Co.* vague precedent has taken a life of its own. If the court had taken the *Gulf Oil Co.* decision as a whole, it would have noticed that the language throughout the decision addresses both the plaintiff's counsel (the communication that was unduly restricted) and *parties* in general.[105] An example of reasonable court limitations on communication recognizes the defendant's need to communicate with putative class members with instructions to ensure that the putative class members are duly informed about their legal rights.[106] In *EEOC v. Morgan Stanley, Inc.*, an Equal Employment Opportunity Commission case on gender discrimination, the court instructed Morgan Stanley to notify anyone it wishes to communicate with of the following:

> Employees must be told that there is a pending lawsuit that they may join, and that it is unlawful for Morgan Stanley to retaliate against them if they do. In addition to informing employees of the right to non-retaliation, the notice must also provide a short summary of the claims in the EEOC lawsuit so that employees can make an informed decision concerning their interest in the case.[107]

The safeguards set by the court in this case are unambiguous; they protect the interests of the putative class members and allow defense counsel to gain information from the putative class members to help build its own case.[108]

The American Bar Association standing Committee on Ethics and Professional Responsibility released a formal opinion stating that contact

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[104] *Id.* The nature of the improper communication between putative class members and defense counsel in this case was a request by the defendant for putative class members to adhere to the arbitration clause agreed to by every Citibank cardholder.

[105] An example of the case moving from general to specific terms, the Court in *Gulf Oil Co.* stated that the district court must determine "[b]ecause of these potential problems, an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 (1981).

[106] Equal Employment Opportunity Comm'n v. Morgan Stanley & Co., 206 F. Supp. 2d 559, 562 (S.D.N.Y. 2002).

[107] *Id.*

[108] *Id.* Behind the court's rationale was the fact that both plaintiff and defense counsel's case turned upon statistical data. "As such, the proof will mirror that in a class action, that is, as showing that there is a gross disparity in compensation and promotion of women who hold the positions of Associate, Vice-President, Principal and Managing Director in Morgan Stanley's Institutional Equity Division compared to their male counterparts." *Id.* at 563.

with putative class members is permissible as long as it complies with Model Rule 4.3. Rule 4.3 of the Model Rules of Professional Conduct prohibits an attorney from implying they are disinterested in dealing with a person who is not represented by counsel on behalf of a client.[109] An attorney may not give legal advice to the "unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[110] ABA opinion 07-445 takes the stance that there is no attorney-client relationship with putative class members until the class certification.[111] As for defense counsel, the ABA opinion takes the position that defense counsel communications cannot be limited for the sake of theoretical potential for abuse because the communication between putative class members and defense counsel is 'vital to efficient and fair class litigation."[112] Lawyers are also prohibited from making a false statement of material fact or law to a third person in the course of representing a client pursuant to Rule 4.1 of the Model Code of Professional Conduct.[113]

To reign in the costs of class action litigation, especially for defendants, Congress has taken a variety of steps to move cases from state courts into the federal court system. The Class Action Fairness Act (CAFA) of 2005 is the latest move in federal intervention on the behalf of defendants facing the rising costs of class action litigation.

III. MOVEMENTS FOR REFORM: ACADEMIC AND FEDERAL ARGUMENTS

Defendants need to have access to a variety of strategies that will result in a favorable resolution for their clients. They may "decide not to oppose class certification. Maximum res judicata effects may be obtained if a class is certified. The defendant may not want to spend the time and money necessary to oppose class certification or may wish to allocate its resources to the merits trial instead."[114] Defendants are not barred by case law from opposing class certification, "in addition to raising a multiplicity of arguments in opposition to a class action, together with supporting affidavits, defendants have often sought deposition and interrogatory

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[109] MODEL RULES OF PROF'L CONDUCT R. 4.3 (1983).
[110] *Id.*
[111] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-445 (2007).
[112] *Id.*
[113] MODEL RULES OF PROF'L CONDUCT R. 4.1 (1983).
[114] 3 NEWBERG ON CLASS ACTIONS 7:3 (2009).

discovery of the named plaintiffs with respect to class issues."[115] The Class Action Fairness Act (CAFA) was written to respond to the urge for Congress to reign-in the costs of class action lawsuits incurred through adhering to the variety of rules in state courts governing class action lawsuits.[116] The Committee on the Judiciary conducted hearings on class action litigation that revealed that, "federal class action filings over the past ten years have increased by more than 300 percent. At the same time, class action filings in state courts have grown more than three times faster--by more than 1000 percent."[117] Its purpose was to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction."[118]

The note attached to 28 U.S.C. § 1711 states that the purpose of CAFA is to address abuses of "keeping cases of national importance out of Federal court" and state and local courts "acting in ways that demonstrate bias against out-of-State defendants."[119] CAFA's purpose is also to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and benefit society by encouraging innovation and lowering consumer prices."[120] The assumption CAFA makes in section (b)(2) is that moving more class action cases from state to federal courts will lower the costs of litigation and induce companies to cut litigation costs normally passed on to consumers in the price of goods.

CAFA has moved many of the class action cases that would be tried in the state courts into federal jurisdiction, allowing defense counsel an easier method of planning for class action cases. Issues encountered for professional conduct in state courts are less of a concern for defense counsel now that CAFA moves many cases that would be tried in state courts in federal court. Plaintiffs, before the creation of CAFA, had the ability to forum shop throughout the United States and bring their cause of action to a state that may provide the most favorable outcome.

Opponents of the bill argue that increasing cases in federal courts will, "[create] an incentive for violators to break the laws of multiple states, as any collective action to hold them accountable will likely be dismissed."[121] Supporters of CAFA perceive that it will "result in fewer

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[115] *Id.*
[116] *See generally* S. REP. NO. 109-14 (2005).
[117] *Id.* at 14.
[118] Class Action Fairness Act of 2005, 119 Stat. 4 (codified as amended at 28 U.S.C. 1171 (2006)).
[119] *Id.*
[120] *Id.*
[121] S. REP. NO. 109-14, at 81.

certified classes. This result would mean fewer settlements and verdicts in plaintiffs' favor, which in turn would limit the regulatory reach of the sorts of state laws often enforced by way of class actions."[122] CAFA also strikes at the heart of plaintiff lawyers' strategy of selecting remote areas known as called 'magnet' jurisdictions in particular counties in Illinois, Texas, Alabama, and Mississippi. These areas were beholden to local lawyers, had spun out of control, and would certify meritless classes to coerce extortionate settlements. The odd frequency with which multi-state class actions found their way to certain isolated counties suggested that there may be something to the magnet jurisdiction claim."[123] If "a state judge is prejudiced in favor of the plaintiff, it is likely because the defendant is a corporation, not because the defendant has its headquarters or principal place of business in another state."[124] Federalization of class actions also promotes uniformity in decisions and helps create a national body of regulatory standards.[125] Creating a body of regulatory standards helps prevent abuses during litigation such as undue restrictions on defendant communication with putative class members, invariably helping resolve conflicts that have a huge impact on the economy.[126]

Powerful plaintiff firms have led to other reforms such as the Private Securities Litigation Reform Act of 1995 (PSLRA).[127] PLSRA, unfortunately, did not deter excessive shareholder lawsuits filed by class representatives; in fact, it only strengthened plaintiffs' law firms that had the resources to bring them to fruition.[128] Plaintiff lawyers in securities litigation are legally allowed to share court-awarded fees with clients who serve as representative plaintiffs.[129] "Nor does federal law require that plaintiffs' counsel make any certifications to the court regarding its relationship, financial or other, with the investors named as plaintiffs."[130]

> The PSLRA's reforms limit the number of times that shareholders may serve as lead plaintiffs and restrict judicial awards compensating and rewarding representative parties. Congress also mandated that plaintiffs accompany

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[122] David Marcus, *Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1252 (2007).
[123] *Id.* at 1293.
[124] *Id.* at 1295.
[125] *Id.*
[126] *Id.* at 1296.
[127] Lisa L. Casey, *Class Action Criminality*, 34 J. CORP. L. 153, 155 (2008).
[128] *Id.* at 156.
[129] *Id.* at 159.
[130] *Id.*

> their complaints with sworn certifications disclosing, among other information, their involvement in certain prior lawsuits and forswearing acceptance of future payments beyond amounts authorized by the statute.... According to prosecutors, Milberg Weiss caused the paid plaintiffs to breach their fiduciary duties by inducing them to serve as class representatives in exchange for a share of Milberg Weiss's attorneys' fees. The fee sharing arrangements allegedly created conflicts of interest for the paid plaintiffs, causing them to favor themselves over the absent class members and engendering in them 'a greater interest in maximizing the amount of attorneys' fees awarded to Milberg Weiss than in maximizing the net recovery to absent class members' and shareholders. [131]

A. *First Amendment Rights of the Defendant are Unduly Burdened by Calls for Increased Pre-Certification Communication*

Lincoln aptly observed that the goal of the justice system is not to breed litigation, but to resolve conflict whether it is through settlement or through trial.[132] Resolution of conflict requires both the plaintiff and defendant be able to engage in communication with each other. Does creating stronger safeguards truly protect putative class members and the class action lawsuit? The defense counsel has an interest in resolving the case in his/her client's favor. Defense counsel's interest in resolution is not always contrary to the interests of the class. In cases where defendants have attempted to coerce putative class members, the courts and plaintiff's counsel have been able to remedy the problem with disciplinary sanctions.[133] Deliberate attempts to circumvent the supervisory role of the court are already punishable by disciplinary codes and have a remedy available via motion by the plaintiff or on the court's own accord to hold defense counsel in contempt of court.[134] Remedies available to the court when damaging communication conducted by the defense counsel are a strong medicine and can include nullification of any opt-out certificates, sanctions, and even settlements that have already occurred to be considered as an advance for a non-existent favorable judgment for the defendants must recover after a victory at trial.[135]

Defense counsel is already subject to adherence to Model Code of Professional Conduct regulations, imposing a commitment to not engage in

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[131] *Id.*
[132] Lincoln, *supra* note 2, at 1.
[133] Bulblitz v. Dupont de Nemours & Co., 196 F.R.D. 545 (S.D. Iowa 2000).
[134] *In re* Fed. Skywalk Cases, 97 F.R.D. 370, 377 (W.D. Missouri 1983).
[135] *Id.* at 378.

misconduct. Both plaintiff and defense counsel are under constraints placed by both professional rules of conduct and the possibility of Federal Rules of Civil Procedure Rule 11 sanctions.[136] In cases where defendants have attempted to coerce putative class members, the courts and plaintiff's counsel have been able to remedy the problem with disciplinary sanctions. Deliberate attempts to circumvent the supervisory role of the court are already punishable by disciplinary codes and have a remedy available in a motion by the plaintiff or on the court's own accord to hold defense counsel in contempt of court.[137] The system, as it stands under *Gulf Oil Co.*, also places the burden on parties to "defend their good faith, at the risk of a contempt citation."[138]

Arguments to strengthen restrictions on the speech of defense counsel before class certification fail to acknowledge the increase in the cost of litigation and the greater time commitments needed by the court to comply with stronger restrictions.[139] Opponents argue that it seems inconsistent for the Court to give the power to control communications after an event because, "that power is worthless if the court is unaware of *any* communication in the first place. It seems illogical to say that a court has the power to confront and solve the problem of improper communication but must wait until randomly becoming aware of a violation to do anything."[140]

Congressional inaction and increased restrictions will create a higher workload for courts. Critics of *Gulf Oil Co.* point out that the standard provided by the court is remedial and only cleans up the damage after the improper communication has occurred.[141] The *Gulf Oil Co.* court didn't reach far enough to protect putative class members by, "requiring parties to present an evidentiary showing of 'actual' or 'threatened' harm before imposing restrictions on pre-certification communication with absent class members."[142] Instead, the Court should have tempered its ruling by considering jurisprudence surrounding commercial speech in general and the law surrounding lawyer advertising and lawyer solicitation. The court already enjoys the right to control litigation from the onset under Federal

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[136] FED. R. CIV. P. 11.
[137] *Fed.Skywalk Cases*, 97 F.R.D. at 377.
[138] Gulf Oil Co. v. Bernard, 452 U.S. 89, 103 n.17 (1981).
[139] *Id.*
[140] Craig M. Freeman, *Knowledge is Power: A Practical Proposal to Protect Putative Class Members from Improper Pre-Certification Communication,* 2006 FED. CTS. L. REV. 2, 10 (2006).
[141] *Id.*
[142] *See Gulf Oil Co.*, 452 U.S. at 89.

Rule of Procedure 16.[143] The defense counsel's adverse interests justify strengthening the regulation of defense counsel communication. This perspective omits the fact that putative class members who opt-out still preserve the right to bring suit in another day at a more favorable forum if necessary. The defendant does not have that choice--they must litigate each case brought against them if the adverse party does not accept settlement.

Stronger regulation of communication will allow plaintiffs unfair advantage and intrusive insight into the financial and business affairs of a defendant who may have close economic or business relationships with putative class members. In the context of the employer-employee relationship, defendants cannot reasonably terminate employment relationships or monitor every communication engaged in with an employee without substantial costs to their bottom line. Plaintiffs' counsel often argues that the employer-employee relationship is ripe for undue influence, which would result in improper, opt-outs by putative class members.[144] Courts have rightly observed, however, that "employees are free to consult legal counsel of their choosing to discuss the ramifications of any waiver and that settlement between and employer and employees should be encouraged."[145] Courts should recognize the value of settlement by declining to practice 'premature judicial intervention' and by not denying the right of the employees to consider settlement offers.[146] Remedies available to the court when damaging communication conducted by the defense counsel are a strong medicine and can include nullification of any opt-out certificates, sanctions, and even settlements that have already occurred to be considered as an advance for a non-existent favorable judgment for the plaintiff defendants must recover after a victory at trial.[147] Defendant's actions in attempting to communicate with putative class members can even be construed as interfering with the court's power.[148]

CAFA may move more cases from the state court system into the federal courts, but it does not provide a remedy for the ambiguous standard of certification problems created by the Supreme Court's *Gulf Oil Co.* decision.[149] Critics at the bills creation argued that the bill infringes upon the delicate fabric of federalism – the balance of power between the state and federal government – by tipping the scales of power away from the states.[150] Senator Graham, in his support of the bill, argued that CAFA

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[143] FED. R. CIV. P. 16.
[144] Bulblitz v. Dupont de Nemours & Co., 196 F.R.D. 545, 547 (S.D. Iowa 2000).
[145] *Id.*
[146] *Id.*
[147] *Id.* at 378.
[148] Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1203 (11th Cir. 1985).
[149] *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 89 (1981).
[150] 149 CONG. REC. S12994-02, 1 (2005).

would actually restore the balance of state and federal power.[151] State courts argued Graham was "trampling over the laws of other States in their zeal to certify nationwide class actions and help enrich, frankly, the plaintiffs' trial bar. The Class Action Fairness Act actually promotes federalism concerns by helping ensure that magnet State court judges stop dictating national policies from their local courthouse steps."[152] The problem of the variety of state rules is now substituted for the judicial discretion for communication issues on a district-by-district basis. The only remedy available to defense counsel is to file an appeal to the appellate court system to overturn abuses of judicial discretion in its orders to manage communication. This presents another hidden cost to defense counsel who only wish to engage in communication to prepare for litigation.

One of the horror stories of the movement behind CAFA's passage involves the Bank of Boston class action settlement – a class action suit for the recovery of over-collected escrow fees charged to homeowners – profiting from the interest collected.[153] The case was brought in Alabama state court, which "awarded up to $8.76 each to individual class members, while the class counsel got more than $8.5 million in fees. To make matters worse, the fees were simply debited directly from individual class members' escrow accounts leaving many of them worse off than they were before the suit."[154]

The main problem with controlling costs of communication is not the defense counsel but rather the unwieldy structure inherent in the class action model, which requires a representative plaintiff to represent the class but does not place enough monitoring to ensure that those interests are adequately represented.[155]

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[151] *Id.*

[152] *Id.*

[153] S. REP. 109-14, at 14 (2005).

[154] *Id.*

[155] Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform,* 58 U. CHI. L. REV. 1, 3 (1991). The problem the author points out that is relevant to communication costs is the fact that plaintiffs' counsel are not under enough regulation:

> The existing regulations are extraordinarily ineffective at aligning the interests of attorney and client; indeed, they often impair the interests of the clients they are ostensibly designed to protect. Many regulatory shortfalls can be traced ultimately to a single fundamental error: the inappropriate attempt to treat entrepreneurial litigation as if it were essentially the same as standard litigation, in which the client exercises substantial influence. Even when the regulatory system

IV. COSTS AND BENEFITS OF DEFENSE COUNSEL COMMUNICATION WITH PUTATIVE CLASS MEMBERS

Research conducted on the correlation between the increase in class action litigation shows a startling trend – "the companies named as defendants in class actions filed in 2008 accounted for over half of the total market capitalization of the financial sector."[156] Many of the companies facing class action litigation are also sustaining heavy losses from the subprime mortgage crisis.[157] Cornerstone Research group's annual survey of class action litigation in the securities sector explains that "most of the lawsuits filed in 2008 were concentrated among the largest financial institutions may indicate a rational strategy by plaintiff law firms to initially focus on defendants with the deepest pockets."[158] The plaintiff law firms often place defense counsel in a position where they are forced to "pay ransom to class attorneys rather than litigating frivolous lawsuits" in fear that any further movement towards litigation at trial will result in an unfavorable outcome for their client.[159] The class action procedural device morphs from a procedural tool into a device that affects the merits of a particular claim.[160] Nonetheless, state court judges often are inclined to certify cases for class action treatment not because they believe a class trial would be more efficient than an individual trial, but because they believe "class certification will simply induce the defendant to settle the case without trial."[161] One of the most prominent costs to defense counsel in engaging in communication with putative class members. In the *Matter of Rhone-Poulenc Rorer, Inc.*, a corporate defendant who engaged in the business of manufacturing antihemophiliac factor concentrate (AHF) faced a pending class certification of class members who were all Hemophiliacs at risk for HIV as a result of using AHF.[162] The case had a large amount of

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> acknowledges that entrepreneurial litigation poses special problems, it frequently attempts to resolve those problems by forcing class action and derivative litigation back into a standard model.

Id.

[156] CORNERSTONE RESEARCH GROUP, SECURITIES CLASS ACTION FILINGS 2008: A YEAR IN REVIEW, http://securities.cornerstone.com (last visited Oct. 22, 2009).

[157] *Id.*

[158] *Id.*

[159] S. REP. 109-14, at 20.

[160] *Id.* at 21.

[161] *Id.*

[162] Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1294 (7th Cir. 1995). Case was appealed to the Seventh Circuit Court of Appeals and voted to grant the petition for rehearing en banc. Judge Posner, in writing the decision to decertify the class, argues that the district judge exceeded his power in his decision to certify the class. The complications involved in the case would require bifurication of such a nature that the Seventh Amendment rights of the defendant

human sympathy – hundreds and thousands of hemophiliacs were infected by the AIDS virus as a result of using products of drug companies that create blood solids.[163] The corporate defendants in this case were faced with a huge obstacle – either fight certification and incur huge public relations and business losses from bad press or settle with class members for a large settlement. Judge Posner, in his opinion, wrote that :

> Perhaps in the end, if class-action treatment is denied (it has been denied in all the other hemophiliac HIV suits in which class certification has been sought), they will be compelled to pay damages in only 25 cases, involving a potential liability of perhaps no more than $125 million altogether. These are guesses, of course, but they are at once conservative and usable for the limited purpose of comparing the situation that will face the defendants if the class certification stands."[164]

Even the court, in its position as the arbitrator and supervisor of class action litigation, acknowledged that the situation for the defendant in this case would require defense counsel to spend funds pursuing *twenty-five* cases in different jurisdictions that may or may not be favorable to the defendant. Not one of those cases would bind the plaintiff class counsel and would give plaintiff the opportunity to reassess litigation strategy in each case in hopes to increase the amount of damages won for the class and attorney's fees.

On Friday, January 29, 2010, Vivendi, a French media corporation was found liable to shareholders for misstatements made by investors of the

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> Of particular relevance here, the judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries. The problem is not inherent in bifurcation. It does not arise when the same jury is to try the successive phases of the litigation. But most of the separate "cases" that compose this class action will be tried, after the initial trial in the Northern District of Illinois, in different courts, scattered throughout the country. The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have justiciable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact.

Id.

[163] *Id.*

[164] *Id.*

company.[165] Vivendi was slapped with a 9.3 billion dollar verdict that may be the largest securities class-action jury verdict in history.[166] The suit was filed on the grounds that Viviendi had mislead investors on the financial status of the company – causing the price of the stock to trade at a higher price than what it was worth.[167] This is the same argument that propelled the class action shareholder lawsuits against financial securities firms after the sub-prime mortgage crisis – that securities firms had mislead investors on the risk entailed by investing in risky sub-prime loans. Experts studying the spike in class action litigation have commented that the increase in securities class actions correlated with the largest companies on the S&P 500.[168] "If we examine the 85 companies in the S&P 500 that Bloomberg classified as being in the financial sector at the beginning of 2005 (prior to the start of the crisis), nearly one-third have been sued in sub-prime liquidity crisis related securities class actions."[169]

V. CONCLUSION

The birth of class action litigation as a procedural device to remedy an aggregate of small claims is not diminished by the abuses inherent in its inception. The purpose of the class action device was to address situations "Where it [was] not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."[170] Abuse in the system began to see anomalies such as the ability of a citizen to "bring a 'federal case' by claiming $75,001 in damages for a simple slip-and-fall case against a party from another state, while a class action involving 25 million people living in all fifty states and alleging claims against a manufacturer that are collectively worth $15 billion must usually be heard in state court (because each individual class member's claim is for less than $75,000)."[171] Cases that were truly of a national importance were kept out of federal courts while cases involving primarily state law claims could be brought to federal courts under diversity jurisdiction. The increase of class action filings has raised the issue as to whether defense counsel should spend time and resources on contacting potential class members to a higher importance.

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[165] Associated Press, *Court Finds Vivendi Liable For Misleading Investors*, N.Y. TIMES, Jan. 30, 2010, at B3.

[165] *In re* Vivendi Universal, S.A. Sec. Litig., 02 Civ. 5571, 2009 U.S. Dist. LEXIS 110283, at *23 (S.D.N.Y. 2009).

[166] *Id.*

[167] *Vivendi Universal*, 2009 U.S. Dist. LEXIS 110283, at *23.

[168] STANDFORD LAW SCHOOL, *supra* note 1, at 8-9.

[169] *Id.*

[170] Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

[171] S. REP. 109-14, at 11 (2005).

Recent legal scholarship has noted that between the years of 1988 and 1989 the number of class actions filed in federal court have "increased by 338 percent and rose by 1042 percent in all state courts during the same period."[172] Fortunately, the recent spike in class action securities filings is considered a small bump in the road rather than an increasingly steep hill for businesses to expect to continuously climb.[173] In fact, "if you rule out specific events, such as stock-options backdating or subprime related cases, the downward trend in class-action litigation might continue."[174]

The sake of justice is a normative interpretative value that can be a bias for or against either party involved in class action litigation. Defendants in class action are typically typecast as power hungry corporations searching for ways to increase profit at the cost of the well-being of other individual actors in society. The plaintiff in a class action is often portrayed as a guardian of public interest and a victim of unscrupulous corporate greed. The court and the judicial system as a whole should decline to engage in such dichotomies when considering whether or not to control the communication of defense counsel. Class actions are unlike any other method of resolution provided by Federal Rules or common law in the fact that plaintiffs' counsel is so tenuously connected to the faceless thousands and occasionally millions of plaintiffs that the lack of contact forces the plaintiff's counsel to act more in its own perceived interests than the interests of putative class members. The abuses are of such an extreme nature that Congress, in its enactment of CAFA, stated that they "undermine the National judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution."[175]

The law on ex-parte communications with absent and putative class members shows that communications are permissible as long as they are not used to unduly influence class members or untruthful about the pending class certification and subsequent litigation.[176] When courts consider whether or not to limit the communication engaged in by defense counsel, they should limit their inquiry to whether "the severity and likelihood of the perceived harm if communications are not limited, the availability of less

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[172] Richmond, *supra* note 9, at 813.

[173] Judy Warner, *The Litigation Storm*, BUS. WEEK (Mar. 20, 2008).

[174] *Id.*

[175] THE CLASS ACTION FAIRNESS ACT OF 2005, 28 U.S.C. § 1711(a)(4) (2006).

[176] Ex-parte communication as defined by Black's Law Dictionary to connote "communication between counsel and the court when opposing counsel is not present." BLACK'S LAW DICTIONARY 297 (8th ed. 1999).

restrictive alternatives and the duration of proposed limitation."[177] Defendants should be able to communicate with putative class members to adequately represent their clients when defendant determines that it is in its best interests to oppose a class action. [178]

Without leadership from Congress or the Supreme Court, the rights of class action defendants are beginning to increase in constriction. The First Amendment is violated when we do not allow a man to speak for fear of their words being negative, subversive or contrary to majority beliefs. This violation also occurs when judges engage in a preemptive strike against defense counsel without a clear record of abusive communication. There is already ambiguity as to whether absent class members in the pre-certification are represented by counsel. Courts have now begun to move towards increasing absent class member rights by holding that putative members of class action suits have a right to representation when being interviewed by opposing counsel.[179] By extending the Court's decision in *American Pipe Construction Co. v. Utah*, the federal district judge weakened the right of defense counsel to communicate with absent class members who may or may not join the class.[180] Unreasonable paternalism won the day when the Court, in its ruling, stated that "If defense counsel or counsel otherwise adverse to their interests is allowed to interview and take statements from often unsophisticated putative class members without approval of counsel who initiated the action, the benefits of class action litigation could be seriously undermined."[181]

It is understandable that the court has to balance interests between defendants involved in class action litigation and plaintiff's counsel. The never-ending tug of war is often a reason why cases settle before they are brought into court. Putative class member may turn into witnesses for trial-therefore any waiver of rights made to speak to defense counsel must be "intelligent and voluntary "without pressure from defense counsel who could represent a former employer or a customer with a close business relationship to the defendant.[182] Settlement is an important tool to alleviate the burden on the court system, but as observed by the United States District Court of DC, "settlement cannot come, however, at the expense of the class action mechanism itself to the detriment of putative class members. The distribution of misleading information in order to exact early settlement agreements from putative class members or the use of coercive tactics is just the kind of wrongful conduct that undermines the class

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[177] Richmond, *supra* note 9, at 835.
[178] 3 NEWBERG ON CLASS ACTIONS § 7.3 (4th ed. 2009).
[179] Dondore v. NGK Metals Corp., No. 00-1966, 2001 U.S. Dist. LEXIS 6268, at *2 (E.D. Pa. 2001).
[180] *Id.*
[181] 1-5 MEALEY'S LITIG. REP. CLASS ACTIONS 22 (2001).
[182] *Dondore,* 2001 U.S. Dist. LEXIS 6268, at *6.

action."[183]

Attempts by Congress to decrease the costs of class action litigation through new legislation such as CAFA have only had a small impact into a growing problem faced by securities firms involved in class action litigation. There have been reports, however, that lawmakers wish to hold a review on the impact of securities class-action lawsuits on U.S. competitiveness.[184] Securities firms that were heavily involved in the subprime mortgage crisis not only face the problem of when communication with putative class members is permissible, they also work under financial constraints caused by the very breach in fiduciary duty that brought on the lawsuit in the first place.

[183] Keystone Tobacco Co., Inc. v. U.S. Tobacco Co., 238 F. Supp. 2d 151, 154 (D.D.C. 2002).

[184] Judy Warner, *The Litigation Storm*, BUS. WEEK (Mar. 20, 2008) ("A letter written to SEC Chairman Christopher Cox from Congressmen Vito Fossella (R-NY) and Gregory Meeks (D-N.Y.) asked Cox to hold such a roundtable, but no date has been set").